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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1987

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RALPH PALIKAPU O KAMOHOALI'I DEDMAN and DR. NOA EMMETT AUWAE ALULI,

Petitioners,

vs.

HAWAII BOARD OF LAND AND NATURAL RESOURCES, ESTATE OF JAMES CAMPBELL and TRUE/MID-PACIFIC GEOTHERMAL VENTURES,

Respondents.

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# APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

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# APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF HAWAII

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RALPH PALIKAPU O'KAMOHOALII DEDMAN and DR. NOA EMMETT AUWAE ALULI, Intervenors-Appellants, and VOLCANO COMMUNITY ASSOCIATION, et al., Petitioners, vs. BOARD OF LAND AND NATURAL RESOURCES, et al., Appellees.

No. 11126

APPEAL FROM BOARD OF LAND AND NATURAL RESOURCES

(G.S. NO. 9/26/85-5)

AND

RALPH PALIKAPU O'KAMOHOALII DEDMAN and DR. NOA EMMETT AUWAE ALULI, Intervenors, and LEHUA LOPEZ, et al., Petitioners, vs. BOARD OF LAND AND NATURAL RESOURCES, et al., Appellees.

No. 11334

APPEAL FROM BOARD OF LAND AND NATURAL RESOURCES

(CDUA No. HA-12/20/85-1830)

July 14, 1987

LUM, C.J. NAKAMURA, PADGETT, HAYASHI, JJ. and INTERMEDIATE COURT OF APPEALS ASSOCIATE JUDGE HEEN IN PLACE OF WAKATSUKI, J., EXCUSED

CONSTITUTIONAL LAW -- personal, civil and political rights -- religious liberty and freedom of conscience -- in general.

In order to find an unconstitutional infringement on religious practices, it is necessary to examine whether or not the activity interfered with by the state was motivated by and rooted in a legitimate and sincerely held religious belief, whether or not claimants' free exercise of religion is burdened by the regulation, the extent of impact of the regulation on the parties' religious practices, and whether or not the state has a compelling interest in the regulations which justified such a burden.

CONSTITUTIONAL LAW -- personal, civil and political rights -- religious liberty and freedom of conscience -- particular matters and applications -- zoning and land use.

Designation of an area as a geothermal resource subzone and approval of specific geothermal development plans do not infringe on claimants' freedom to exercise their religion where it is undisputed that claimants never used the land for religious purposes and have presented no objective evidence of harm to religious practices.

ADMINISTRATIVE LAW -- powers and proceedings of administrative agencies, officers and agents -- hearings and adjudications -- findings.

SAME -- same-- same -- conclusions.

Hawaii Revised Statues § 91-21 (1985) requires an agency to rule upon proposed findings, but a separate ruling on each proposed finding filed by a party is not indispensable. The statute only requires that the parties not be left to guess, with respect to any material questions of fact, or to any group of minor matters that may have cumulative significance, the precise findings of the agency.

ADMINISTRATIVE LAW -- judicial review of administrative decisions -- scope of review in general -- burden of showing error.

An agency's findings are presumptively correct, and cannot be set aside on appeal unless they are

shown to be clearly erroneous in view of the reliable, probative and substantial evidence of the records as a whole.

OPINION OF THE COURT BY LUM, C.J.

I.

This appeal presents us with various challenges to the approval of the development of geothermal energy in the Kilauea Middle East Rift Zone ("KMERZ") on the island of Hawaii. The two separate appeals taken from the decisions of Board of Land and Natural Resources ("Board") were consolidated at oral argument as they present similar facts and issues to this court. Hawaii Rules of Appellate Procedure 3(b).

Both cases challenge the decision to permit geothermal energy development in the KMERZ area on the ground that is violates Appellants' right to freely exercise their religion. In No. 11126, Appellants also allege that Board failed to adequately consider their religious claims in weighing the criteria for

establishing a geothermal resource subzone under Hawaii Revised Statutes ("HRS") § 205-5.2(d)(3)(1985).

Other errors alleged on appeal concern the designation of the area as a geothermal resource subzone and the grant of a permit to develop a 25 megawatt ("MeW") geothermal generator with exploration of development of another 75 MeW of geothermal energy in the future.

We affirm.

II.

In 1983 the Hawaii legislature passed the Geothermal Energy Act which granted the Board of Land and Natural Resources primary responsibility for establishing geothermal resource zones within the state. Act 296, § 3, 1983 Haw. Sess. Laws 638, codified at HRS § 205.2(a) (1985). Once the Board has established such zones, if the project falls within

the area zoned conservation land, as in the present case, then the Board has jurisdiction to approve the project. Act 151, § 2, 1984 Haw. Sess. Laws 279, codified at HRS § 205-5.1(d) (1985).

In the present case, Appellees The Estate of James Campbell and True/Mid-Pacific Geothermal Ventures (collectively "Campbell") applied for a conservation district use permit in the Kahauale'a area on March 2, 1982. Over the next year, the Board received the environmental impact statement on the application and conducted contested case hearings concerning this matter. On February 25, 1983, the Board heard oral argument on the application, propounded its findings of fact and conclusions of law, and rendered its Decision and Order ("February 25, 1983 Decision"). The February 25, 1983 Decision granted

Campbell the permit with 43 conditions on exploration and development of baseline activities.

In June of 1983, volcanic eruptions in the Kahauale'a area caused some question as to the safety of tapping geothermal resources in the specific site approved. In May of 1984, the Board proposed administrative rules concerning hearings on the designation and regulation of geothermal resource subzones. Also in May of 1984, the legislature passed Act 151, which mandated the Board to assess the February 25, 1983 Decision regarding the Kahauale'a area as a geothermal resource subzone. 1984 Haw. Sess. Laws § 3, at 281. In July, the Board's administrative rules concerning geothermal subzones were adopted, and in August they were amended.

Throughout 1984, various public and

contested case hearings were held around the island of Hawaii concerning designation of the Kahauale'a area as a subzone. On December 28, 1984, the Board issued its preliminary Decision and Order approving the designation of the Kahauale'a area as a geothermal subzone ("December 28, 1984 Decision"). The decision instructed Campbell to explore the possibility of a land swap wherein the Kahauale'a land, which is situated adjacent to Volcano National Park, would be exchanged for land in the Wao Kele 'O Puna Natural Area Reserve (to the east) in the KMERZ. On August 10, 1984, Campbell applied for a conservation district use permit to develop 100 MeW of geothermally generated electricity in the KMERZ.

During much of 1985 more public and contested case hearings were held on

designation of the KMERZ as a geothermal resource subzone. In October of 1985, the Board amended the December 28, 1984 Decision and approved the land swap but included an area to be later given to the nearby national park.

In November of 1985, Appellants were granted intervenor status in the scheduled contested case hearings concerning the approval of the KMERZ area as a geothermal resource subzone. The hearings were held from November 13 to 15 in Hilo. On December 20, 1985, the Board issued its Decision and Order, and on April 9, 1986, it issued findings of fact and conclusions of law ("April 9, 1986 Decision") approving of 9,014 acres as a geothermal resource subzone.

On December 27, 1985, the State and Campbell Estate exchanged deeds, the State receiving the Kahauale'a land and Campbell Estate receiving a portion of

the KMERZ area. The State reserved, however, mineral rights, including the underground steam, and required Campbell Estate "covenant that the use and enjoyment of the land conveyed shall not be in support of any policy which discriminates against anyone based upon race, creed, color or national origin." See HRS § 171-64 (1985).

The Board accepted Campbell's application for a conservation district use permit on January 3, 1986 and required that they complete an environmental impact statement on the proposed action. A public hearing on the application was heard on January 13, 1986, at which time a contested case hearing was requested. Contested cases hearings were held from February 18 to 23, 1986 and on March 14, 1986. The Board issued its Decision and Order on April 11, 1986 later amended by the

findings of fact and conclusions of law filed June 18, 1986 ("June 18, 1986 Decision"). The June 18, 1986 Decision permits Campbell to explore, develop, and produce up to 25 MeW of geothermal energy, and allows Campbell to explore for the future development of an additional 75 MeW, all subject to compliance with conditions on archaeological sites and air, water, land noise, and light pollution monitoring.

Defendants subsequently filed a motion to appeal to this court. The Board granted Appellants' motion on September 28, 1986.[1/]

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[1/] In 1985, the legislature provided for appeals directly to the supreme court from decisions of the Board approving a project within the resource subzone. Act 226, § 1, 1985 Haw. Sess. Laws 414, codified at HRS § 205-5.1(f) (1985). Jurisdiction over the present appeal is based on this subsection.

III.

Appellants' religious claims regard to both the designation of a geothermal resource subzone and the granting of the permit are essentially the same. Hence, this issue is treated immediately below. Challenges to the Board's exercise of discretion involve separate issues and are treated separately for each appeal in section IV.

Appellants' main contention on appeal is that the approval of the geothermal project will infringe on their religious practices as "Pele practitioners." According to Appellant Aluli, the goddess[2/] Pele migrated to the

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2/According to Appellants, Pele is considered either an akua (god) or an aumakua (family or personal god). This distinction has significance insofar as one witness considered Pele as an aumakua, and worshipped Pele in her home.

Northwestern Hawaiian Islands from Tahiti. She then moved down the island chain until she reached the island of Hawaii where she lives today. Areas in the island chain where she attempted to establish herself are considered sacred. Appellant Aluli identified as especially sacred the area "from Moku'aweoweo [the top of], Mauna Loa, all the way down including these areas from Puna to Ka'u" on the southeastern portion of the island. Phenomena associated with the volcanic activity, i.e., heat, steam, magma, as well as the surrounding landscape, i.e., ferns, shrubs, land and even the rain, are also considered sacred. Development of geothermal resources in the area, Appellants contend, will impinge on their right to freely exercise their religion as guaranteed under the first amendment

to the United States Constitution[3/] and article I section 4 of the Hawaii Constitution.[4/]

In order to find an unconstitutional infringement on Appellants' religious practices,

> it [is] necessary to examine whether or not the activity interfered with by the state was moticated by and rooted in a legitimate and sincerely held religious belief, whether or not the parties' free exercise of religion had been burdened by the regulation, the extent or impact of the regulation on the parties' religious practices, and whether or not the state had a compelling interest in the regulation which justified such a burden.

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[3/]This amendment reads in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" U.S Const. amend. I.

[4/]This section provides in part: "No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof[.]" Haw. Const. art. I, §4.

State ex rel. Minami v. Andrews, 65 Haw. 289, 291, 651 P.2d 473, 474 (1982). Accord Wisconsin v. Yoder, 406 U.S. 205 (1972). Moreover, the United States Supreme Court has "long recognized a distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not absolute." Bowen v. Roy, 476 U.S. ____, ____, 106 S. Ct. 2147, 2152, 90 L. Ed. 2d 735, 744 (1986). See Braunfeld v. Brown, 366 U.S. 599, 603 (1961); Reynolds v. United States, 98 U.S. (8 Otto) 145 (1879). Accord Koolau Baptist Church, 68 Haw. ____, ____, 718 P.2d 267, 271 (1986).

Neither the Board nor Campbell questions the legitimacy and sincerity of Appellants' religious claims. We therefore turn to the issue of whether or not the parties' free exercise of

religion had been burdened by the regulation, and the extent or impact of the regulation on the parties' religious practices.

As a preliminary matter, "it is necessary in a free exercise case for one to show the coercive effect of the [law] as it operates against him in the practice of this religion." School District of Abington Township v. Schempp, 374 U.S. 203, 223 (1963). Accord Thomas v. Review Board, Indiana Employment Security Division, 450 U.S. 707, 717-18 (1981); Koolau Baptist Church v. Department of Labor, 68 Haw. at ___, 718 P.2d at 272 (1986). Appellants' assert this burden though testimony that construction of geothermal energy plants will desecrate the body of Pele by digging into the ground and will destroy the goddess by robbing her of vital heat. They claim this will interfere

with their ritual practices, and will disable them from training young Hawaiians in traditional beliefs and practices (e.g., chant and hula). As such, approval of the geothermal plant does not regulate or directly burden Appellants' religious beliefs,[5/] nor inhibit religious speech.[6/] Further, the Board's action does not compel them, by threat of sanctions, to refrain from

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[5/] Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985); Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985); Follet v. Town of McCormick, 321 U.S. 573, 577-78 (1944); Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943).

[6/] Cf. Widmar v. Vincent, 454 U.S. 263 (1981); Wooley v. Maynard, 430 U.S. 705 (1977); Cantwell v. Connecticut, 310 U.S. 296 (1940).

religiously motivated conduct[7] or engage in conduct they find objectionable on religious grounds.[8] See Bowen, 476 U.S. at ____, 106 S.Ct. at 2153-54, 90 L.Ed.2d at 746 (plurality opinion); Braunfeld, 366 U.S. at 603.

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[7] Cf. Goldman v. Weinberger, 475 U.S. 502 (1986); Sherbert v. Verner, 374 U.S. 398 (1963); Braunfeld v. Brown, 366 U.S. 599 (1961); Prince v. Massachusetts, 321 U.S. 158 (1944); Cox v. New Hampshire, 312 U.S. 569 (1941); Pierce v. Society of Sisters, 268 U.S. 520 (1925); Reynolds v. United States, 98 U.S. (8 Otto) 145 (1879).

[8] Cf. Hobbie v. Unemployment Appeals Comm'n of Florida, ____ U.S. ____, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987); Thomas v. Review Board, Ind. Employment Sec. Div., 450 U.S. 707, 717-18 (1981); United States v. Lee, 455 U.S. 252, 259 (1982); Wisconsin v. Yoder, 406 U.S. 205 (1972); Gillette v. United States, 401 U.S. 437 (1971); Sch. Dist. Abington Township v. Schempp, 374 U.S. 203 (1963); Torcaso v. Watkins, 367 U.S. 488 (1961); West Virginia Bd of Ed. v. Barnette, 319 U.S. 624 (1943); Jacobson v. Massachusetts, 197 U.S. 11 (1905).

Rather, Appellants assert an infringement on their religious practices. In order to demonstrate the coercive effect of the geothermal project, Appellants must show a "substantial burden" on religious interests. Koolau, 68 Haw. at ____, 718 P.2d at 272; Wisconsin v. Yoder, 406 U.S. at 218. Yet it is uncontested that "[n]either of the [Appellants] nor any of the witnesses testified that they ever conducted or participated in religious ceremonies on this land." And the Board specifically concluded that "[t]here is no indication that tapping this heat source from the earth has diminished or negatively affected the eruptive nature of Kilauea Volcano." There is simply no showing of "the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent."

Wisconsin v. Yoder, 406 U.S. at 218.

To invalidate the Board's actions based on the mere assertion of harm to religious practices would contravene the fundamental purpose of preventing the state from fostering support of one religion over another.[9/] As Judge Learned Hand stated:

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[9/]The entire amendment was designed to insulate religious activity from state involvement. See Everson v. Bd. of Education, 330 U.S. 1, 8-10 (1947); Walz v. Tax Comm'n., 397 U.S. 664, 668 (1970); Watson v. Jones, 80 U.S. (13 Wall.) 679, 730 (1871). See generally L. Tribe, American Constitutional Law 814-15 (1978); McCoy, A Unifying Theory for the Religion Clauses of the First Amendment, 39 Vand. L. Rev. 249, 255 & n. 20 (1978). The Supreme Court has summarized the purpose behind the free exercise clause thus: "Congress [is] deprived of all legislative power over mere opinion, but [is] left free to reach actions which [are] in violation of social duties or subversive of good order." United States v. Reynolds, 98 U.S. (8 Otto) at 164.

> The First amendment. . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities. . . . We must accommodate our idiosyncracies, religious as well as secular, to the compromises necessary in communal life[.]

Otten v. Baltimore & Ohio R. Co., 205 F.2d 58, 61 (2d Cir. 1953). Accord Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710 (1985).

We find no merit to Appellants' claim that the project will substantially burden their religious practices. As the Board stated, "[b]y virtue of the land exchange, the proposed development site will be an additional 5 to 10 miles away from Moku'a'weoweo and Halema'uma'u where tradition suggests Pele to reside." Moving the project away from the volcanic phenomena associated with Pele further accommodates Appellants' religious

practices.

The free exercise clauses of the state and federal constitutions are "written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government." Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas J., concurring). Accord Bowen, 476 U.S. at ____, 106 S.Ct. at 2152, 90 L.Ed.2d at 744. See Crow v. Gullet, 541 F.Supp. 785, 791 (D.S.D. 1982) ("the free exercise cause places a duty upon a state to keep from prohibiting religious acts, not to provide the means or the environment for carrying them out."), aff'd 706 F.2d 856 (8th Cir.) (per curiam), cert. denied sub nom. Fools Crow v. Gullet, 464 U.S. 977 (1983). See also Inupiat Community of Arctic Slope v. United States, 548 F.Supp. 182, 188-89 (D. Alaska 1982), aff'd 746 F.2d 570 (9th

Cir. 1984) (per curiam); cert. denied, ____ U.S. ____, 106 S.Ct. 68 (1985).

IV.

Appellants' other objections to development of geothermal energy in the area allege errors by the Board peculiar to each of the Board's decisions: designation of a geothermal resource subzone in No. 11126 and permit approval of a geothermal site in No. 11334.

A. Case No. 11126

Appellants assert that Board's procedure in designating the area as a geothermal resource subzone violates due process in that the Board's Administrative Rule § 13-184-6[10/] failed to provide an

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10/This rule reads:

Criteria for the designation of subzones. The board, in designating an area a geothermal resource subzone, shall be guided by the (Cont. on next page)

"ascertainable standard sufficient to meet constitutional requirements," and

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10/(Cont.) selection of those areas that can demonstrate an acceptable balance among the criteria set forth below:

(1) That the area has potential for geothermal activities;
(2) That there is a known or likely prospect for the utilization of geothermal resources for electrical energy production;
(3) That any potential geologic hazards to geothermal production or use in the proposed area are examined;
(4) That any environmental or social impacts of the development of geothermal resources within the proposed area be considered;
(5) That the compatibility of development and utilization of geothermal resources within the proposed area is considered with other allowed uses within the area and within the surrounding lands; and
(6) That the potential benefits to be derived from geothermal development and utilization in the proposed area be in the interest of the county or counties involved in the State as a whole.

Administrative Rules of the Department of Land and Natural Resources, § 13-184-6 (1984).

the Board's delegate, the Department of Water and Land Development ("DOWALD") failed to adequately assess the potential effects of subzoning. They further allege the Board erred in accepting or rejecting their proposed findings concerning the impact of the proposed development on Pele practitioners. We take each issue in turn.

In the past, we have given great deference to an administrative agency's interpretation of its legislative mandate and its own administrative rules. See e.g., Aio v. Hamada, 66 Haw. 401, 407, 664 P.2d 727, 731 (1983); Treloar v. Swinerton & Walberg Co., 65 Haw. 415, 424, 653 P.2d 420, 426 (1982). "Although administrative convenience or even necessity cannot override the constitutional requirement of due process, . . . agencies 'should be free to fashion their own rules of procedure

and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" Yamada v. Natural Disaster Claims Commission, 54 Haw. 621, 627, 513 P.2d 1001, 1005 (1973) (citation omitted) (quoting F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940) (footnote omitted)).

Administrative Rule § 13-184-6 substantially adopts the criteria for establishing a geothermal resources subzone set forth by the legislature in HRS § 205-5.2(b) (1985). The following subsection, HRS § 205-5.2(c), states "[m]ethods for assessing the factors in subsection (b) shall be left to the discretion of the board and may be based on currently available public information." Thus, the statutory scheme explicitly contemplates the Board's use of its discretion in determining the

appropriate boundaries for designation of the geothermal resource subzone. We hold the statute is sufficiently clear to comport with due process. Cf. Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 830-31 (1st Cir.) (regulation requiring subdivision plan to be in "best interests of the town" not unconstitutionally vague), cert. denied 459 U.S. 989 (1982); Dillow v. City of Peoria, 49 Ill.2d 314, ____, 274 N.E.2d 96, 97-98 (1971) (ordinance with purpose to protect "high ration of home ownership" not vague); Maryland-National Capital Park and Planning Commission v. Mayor and Council of Rockville, 272 Md. 550, ___, 325 A.2d 748, 753-54 (1974) (statute not permitting land use changes "substantially different" not vague).

Appellants also allege the initial assessment done by DOWALD's Manager-Chief

Engineer Manbu Tagomori was based on unconstitutionally vague standards. Tagomori testified that the team evaluated the appropriate area based on "personal experience" and "best judgment." The fact that Tagomori's team used these sources in identifying the appropriate area does not invalidate the proposal. This is precisely what the Board was mandated to do. HRS § 205-5.2(c). Moreover, the statute and the relevant administrative rules only requires use of the guidelines in evaluating final approval of the subzone. HRS § 105-5.2; Administrative Rules of the Department of Land and Natural Resources, §§ 13-184-2 through 13-184-9. Designation of the subzone was the subject of extensive hearings by the Board in reviewing the various evidence put before it. There is simply no merit

to Appellants' claim that they were denied due process.

Appellants' contention that the Board failed to accept or reject certain proposed findings is also without merit. HRS § 91-12 (1985) does require an agency to rule upon proposed findings, but "a separate ruling on each proposed finding filed by a party is not indispensable." In re Hawaiian Telephone Co., 54 Haw. 663, 668, 513 P.2d 1376, 1379 (1973) (quoting In re Terminal Transportation, Inc., 54 Haw. 134, 139, 504 P.2d 1214, 1217 (1972)). It requires that the parties not be left to guess, with respect to any material questions of fact, or to any group of minor matters that may have cumulative significance, the precise findings of the agency. Id.

The Board accepted Appellants' proposed findings of fact 12 and 18, set

out in the margin,[11/] when if found:

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[11/]The proposed findings of fact read:

> 12. Pele is central and indispensable to Native Hawaiian religious beliefs and practices.
>
> . . . .
>
> 18. Pele influences and informs the daily physical and spiritual life of Pele practitioners. It is essential to them that Pele not be violated and degraded, and that she be allowed to exist in her unaltered form and in a pristine natural environment.
>
> . . . .
>
> 21. Geothermal exploration and development will diminish and finally destroy Pele's creative force. This will cause spiritual, cultural, psychological and sociological injury to the people who worship and respect Pele.
>
> . . . .
>
> 25. Violation and desecration of the sacred body of the god Pele as Pele practitioners believe will occur with geothermal exploration and development, will destroy the relationship and communication which Pele practitioners have with the god Pele.

> 136. . . . Pele is believed to also be present in the sacred area surrounding the Kilauea Volcano in kinolau (alternate body forms) such as ferns, certain shrubs and trees, and certain volcanic land forms or features, such as significant pu'u (hills).
>
> . . . .
>
> 139. . . . There was testimony indicating that Pele is a spiritual concept central to the lives and psychological survival of the believers, and that Pele provides inspiration, strength and a focus for their lives. . . .

Further, the Board rejected findings 21 and 25, also set out in the margin, when it determined that Appellants failed to show sufficient burden on their religious practices.

B. Case No. 11334

In this appeal, Appellants challenge the Board's findings with respect to the economic feasibility of the development of geothermal energy. Additionally, they argue the Board has filed to apply its

regulations with regard to permitted uses for granting a conservation district use permit in a subzone P (Protected) area.

Both of these contentions are without merit. The Board's findings of fact are presumptively correct, and cannot be set aside on appeal unless they are shown to be "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Stop H-3 Ass'n. v. State Department of Transportation, 68 Haw. ___, ___, 706 P.2d 446, 451-52 (1985) (quoting HRS § 91-14(g) (1976)). There was more than sufficient evidence before the Board to conclude development of 25 MeW of energy would be presently economically feasible and the island's energy needs would likely increase in the future.

With regard to the subzone classification, the Board redesignated

the KMERZ area as a geothermal resource subzone as a result of the previous contested case hearings. Hence, there was no requirement that the Board consider subzone P criteria in granting the conservation district use permit to Campbell.

V.

A claim of constitutional infringement on religious practice requires a burden showing significant harm. Appellants have not shown a burden of constitutional dimension.

Appellants' other assertions of error are also without merit. The April 9, 1985 Decision approving the geothermal resource subzone and the June 18, 1986 Decision granting the conservation district use permit are affirmed.

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# APPENDIX B

BEFORE THE BOARD OF LAND
AND NATURAL RESOURCES

STATE OF HAWAII

| | | |
|---|---|---|
| In the matter of the | ) | CDUA NO. |
| Conservation District | ) | HA-12/20/85-1830 |
| Use Application of the | ) | Findings of Fact |
| Estate of James Campbell | ) | Conclusion of Law |

Honolulu, Hawaii

June 18, 1986

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## ABBREVIATIONS

| | |
|---|---|
| BLNR | Board of Land and Natural Resources |
| Board | Board of Land and Natural Resources |
| CDUA | Conservation District Use Applications |
| DLNR | Department of Land and Natural Resources |
| DOH | Department of Health |
| DOWALD | Division of Water and Land Development |
| dBA | Decibles |
| EPA | Environmental Protection Agency |
| GRS | Geothermal Resources Subzone |
| KMER/GRS | Kilauea Middle East Rift Geothermal Resource Subzone |
| HAAQS | Hawaii Ambient Air Quality Standards |
| HELCO | Hawaii Electric Light Company |
| HECO | Hawaiian Electric Company |
| Ldn | Day-night noise levels |
| SLUC | State Land Use Commission |
| MW | Megawatts of Electrical Power |

| | |
|---|---|
| NAR | Natural Area Reserve |
| NPS | National Park Service |
| VCA | Volcano Community Association |
| OEQC | Office of Environmental Quality Control |
| ppm | Parts Per Million |
| ppb | Parts Per Billion |
| APP | Applicant |
| Ex | Exhibit |
| EIS | Environmental Impact Statement |
| TR | Transcript |

## I. INTRODUCTION

Geothermal energy is considered the State's largest and only near-term alternative source of base-load electrical energy. Geothermal energy has been proven to be a reliable source of energy in many parts of the world including the United States. In the Geyser region of Northern California, over 1,000 megawatts (MW) of electrical power is currently produced by a geothermal source.

Hawaii is presently over 90% dependent on imported fossil fuel for its energy. It is the State of Hawaii's objective to become energy self sufficient and independent of imported fuel by developing renewable indigenous resources for electrical power generation. It is the State's objective to "accelerate the transition to an

indigenous renewable energy economy by facilitating private sector activities to explore supply options and achieve local commercialization and application of appropriate alternate energy technologies." (State Energy Plan, June, 1984, p. 15)

II. BACKGROUND

To understand the context in which this application arises, it is necessary to briefly review the history of the applicant's geothermal proposals. On March 2, 1982, the Estate of James Campbell filed a Conservation District Use Application (CDUA) with the Department of Land and Natural Resources to develop geothermal resources at Kahauale'a, Hawaii. This CDUA, No. HA-3/2/82-1463, was processed and a draft Environmental Impact Statement prepared. On May 20, 1982 a petition for a

contested case hearing on the CDUA was filed. The petition was granted. The contested case hearing was convened on October 5, 1982, and continued on October 25 through 29, 1982, November 15 through 19, 1982, and December 7 through 10, 1982.

The Board of Land and Natural Resources (BLNR) made extensive findings of fact, issued a conclusion of law, and decision and order dated February 25, 1983, granting the Estate of James Campbell limited exploration rights within a designated area of 800 acres located at Kahauale'a, Puna, Hawaii.

Subsequent to the BLNR's February 28, 1983 decision and order, the Hawaii State legislature passed Act 296, SLH 1983, delegating to the BLNR the responsibility of designating geothermal resource subzones throughout the State of Hawaii by selecting those areas that best

demonstrate an acceptable balance among seven criteria now codified in HRS 205-5.2.

Pursuant to Act 296, SLH 1983, the Chairperson of the BLNR assigned the Division of Water and Land Development (DOWALD), of the Department of Land and Natural Resources (DLNR) the task of assessing and recommending geothermal resource subzones (GRS). DOWALD began work on the assessment of potential geothermal resource subzones on June 14, 1983, when Act 296, SLH 1983 was signed into law.

In 1984, the Legislature passed Act 151. This act gave first priority to the assessment of the Kahauale'a area as a potential geothermal resource subzone and required the BLNR to act on the designation of the Kahauale'a area by December 31, 1984. DOWALD assessed the

Kahauale'a area and proposed a 5300-acre area for designation as a GRS.

Public information meetings and public hearings were held as part of the subzone designation process. At the public hearing held on September 12, 1984 in Hilo, Hawaii, requests for a contested case hearing on the proposed Kahauale'a GRS, were made to the BLNR and subsequently granted. The BLNR conducted the contested case hearing on December 12-20, 1984 in Hilo, Hawaii and issued its decision and order on December 28, 1984.

In the December 28, 1984 decision and order, the BLNR designated the 800-acre area described in its February 25, 1983 decision and order as a geothermal resource subzone under the following conditions upon:

(1) Cessation of volcanic activity

in, around and near the area permitted by the Board's February 25, 1983 decision and order.

(2) No new geothermal development activity associated with the permitted area shall be considered until after it has been determined that the geologically hazardous and eruptive activity has creased.

(3) The Board formally requested the Estate of James Campbell to investigate and consider a land exchange involving State-owned lands in the Kilauea Middle East Rift Zone and Campbell Estate's lands at Kahauale'a.

(4) The BLNR further resolved to consider the Kilauea Middle East Rift Zone for designation as a GRS on the basis of information presented at the contested case hearing which indicated that Campbell's Kahauale'a property

contained higher quality native habitat than the Wao Kele 'O Puna Natural Area Reserve (NAR).

(5) The Board directed the Division of Water and Land Development to assess the Kilauea Middle East Rift Zone in and adjacent to the Wao Kele 'O Puna Natural Area Reserve beginning on the western boundary of the existing Kamaili GRS. This area had not previously been evaluated as a GRS because of its classification as a Natural Area Reserve. Conversely, the privately owned Kahauale'a lands had not been previously considered as a natural area reserve because under State law, natural area reserves may only be on State land.

(6) The decision further stated that if (a) the assessment of the Kilauea Middle East Rift Zone does not result in a designation as a geothermal resource

subzone, or (b) a land exchange between the State of Hawaii and the Estate of James Campbell is not consummated, then the remainder of the 5300 acre Kahauale'a area originally proposed by DOWALD for designation as a GRS, shall be designated as a GRS.

(7) The Board urged the federal government and the National Park Service (NPS) to seek acquisition of Tract 22 (described in the Volcanoes National Park Master Plan), which the State will not itself seek, but which is desired by the NPS for addition to the Volcanoes National Park.

(8) Finally, the decision provided that ". . . if the State of Hawaii and Campbell Estate should later consummate a land exchange involving lands at Kahauale'a for State or other lands upon which geothermal activities may take

place, then the geothermal subzone designation in this Decision and Order shall crease to exist and shall have no force or effect in law. . ."

Pursuant to the decision and order of December 28, 1984, DOWALD conducted an assessment of the Kilauea Middle East Rift Zone in an adjacent to the Wao Kele 'O Puna NAR for a geothermal resource subzone, using the same criteria set forth in Act 296, SLH 1983.

The assessment of the Kilauea Middle East Rift Zone is outlined in the DOWALD Circular C-114 (State Ex. 2, G.S. No. 9/26/85-5) and in the proposal to designate the area as a GRS (State Ex. 1, G.S. No. 9/26/85-5).

The BLNR held a public hearing on the proposed designation of the Kilauea Middle East Rift as a geothermal resource subzone on September 26, 1985, and at

that time, a request for a contested case hearing was made to the BLNR.

On October 16, 1985 the BLNR announced that a contested case hearing would be held on the proposed GRS designation on November 12, 1985, in Hilo, Hawaii. On November 13, 14, and 15, 1985, the BLNR conducted a contested case hearing on the proposed designation of 11,745 acres in the Kilauea Middle East Rift Zone as a geothermal resource subzone. On December 20, 1985, the Board issued a decision and order designating approximately 9,014 acres of the Wao Kele 'O Puna area as a GRS. On April 9, 1986, the Board issued its findings of fact, conclusions of law and revised decision and order.

## IV. FINDINGS OF FACT

The Board of Land and Natural Resources makes the following Findings of Fact. These findings of facts are organized for convenience and clarity in accordance with the factors identified in HRS 205-5.2 and Campbell Estate's application. The Board incorporates by reference all of the record in each of the previous proceedings related to Campbell Estate's geothermal development applications and GRS designations:

1. Kahauale'a CDUA, file No. HA-3/2/82-1463.

2. Kahauale'a Subzone designation, file No. 8/27/84-1

3. Kilauea Middle East Rift Subzone designation, file No. 9/26/85-5.

Hawaiian Religion and Traditions

91. The current day practice of Native Hawaiian religion includes the worship of the goddess Pele. Many native Hawaiians regard Pele as an akua (god) or as aumakua (family or personal god). Some native Hawaiians also identify themselves as the bloodline of Pele. Hawaiians who actively worship the goddess Pele have been identified as "Pele practitioners". (Written Testimony of Manabu Tagomori, G.S. No. 9/26/85-5; Testimony of Dr. Emmett Aluli, G.S. No. 9/26/85-5)

92. Pele practitioners believe Pele is a living deity, whose presence is manifested in periodic and frequent volcanic eruptions. (Testimony of Dr. Emmett Aluli, Ex. 2, G.S. No. 9/26/85-5)

93. However, there are other Hawaiians who have very different

beliefs. One witness testified that according to traditional Hawaiian religion, there are four major gods: Ku, Kane, Lono, and Kanaloa. The responsibility of volcanism rests with the god, Ku. The deity to which this responsibility was delegated was a god named 'Aila'au, which means "one who consumes forests". The god "Aila'au is considered indigenous to the Hawaiian tradition. (APP. Ex. 19, p. 1)

94. It was the testimony of two Pele practitioners that they believe that the area of active volcanism is in fact Pele's physical body, her home or abode. They testified that some individuals believe Pele's home encompasses an area extending from Mauna Loa through the Kau and Puna districts to the ocean, including the entire area of the Kilauea Volcano and the East and Southwest Rift

Zones. (Testimony of Dr. Emmett Aluli, G.S. No. 9/26/85-5)

95. It is believed that Pele may have migrated to the Hawaiian Islands. Her domicility can be traced to several other islands of Polynesia before coming to Hawaii, among these being Tahiti, Samoa and Aitutaki. Although accounts of her sojourn today are not clear, one witness testified through a chant describing Pele's migration to Kauai, through Oahu and finally settling down in Puna. (APP. Ex. 19, p. 1; Testimony of Puulani Kanahele, TR Vol. VIII, pp. 108-109)

96. In a book entitled, "Hawaiian Mythology", compiled by Beckwith and including information from highly respected native Hawaiian scholars, it is stated that Pele approaches the Hawaiian Islands from the northwest, tries island

after island without success and finally settles on Hawaii at the crater Moku'a'weoweo. (APP. Ex. 19, p. 2)

97. Most Hawaiian history was orally passed from generation to generation until 1820 where some form of written history began. (Testimony of Abraham Piianaia, TR Vol. XI, p. 52)

98. Abraham Piianaia, Director of Hawaiian Studies at the University of Hawaii, and a native Hawaiian testified that he was told by his grandparents that the Moku'a'weoweo is the actual home of Pele, not Halema'uma'u. The name Halema'uma'u means "home of the ma'uma'u fern", where as Moku'a'weoweo means "a fiery red island" which refers to what the firepit looks like, particularly during an eruptive period. In addition, he testified that he was also told that those Hawaiians who were truly devotees

of Pele paid homage to her at Moku'a'weoweo. Halema'uma'u became a place where Pele is worshipped as a matter of convenience. (APP. Ex. 19, pp. 2-3)

99. Today, Pele practitioners worship Pele by making offerings to her. The specific details of how and where such private offerings are made were not presented to the Board during the contested case hearing. There was testimony indicating that Pele is a spiritual concept central to the lives and psychological survival of the believers, and that Pele provides inspiration, strength and a focus for their lives. (Intervenors Aluli and Dedman, Ex. 2, and Pre-Hearing Statements, G.S. No. 9/26/85-5)

100. By virtue of the land exchange, the proposed development site will be an

additional 5 to 10 miles away from Moku'a'weoweo and Halema'uma'u where tradition suggests Pele to reside. It will be further removed from Puu O'o's current eruptive activity than the applicant's original proposal at Kahauale'a.

101. Dr. Aluli and Palikapu Dedman testified that they considered any activity impermissible within the area considered to be Pele's abode. The Board notes that there are existing man-made structures including wells throughout lower Puna. The belief that geothermal exploration and development will cause desecration of Pele is not a view universally held by all Hawaiians. In fact, some Hawaiians believe that the development of geothermal energy is not counterproductive to native Hawaiian culture and heritage. One person

testified that "the traditional Hawaiian culture is one of sharing and self-sufficiency by using the natural resources, including geothermal resources to the fullest extent possible to support the population with less impact not only to the population than and into the future, but also to the environment. Cognizant of this heritage, it is my opinion that the use of geothermal energy is in keeping with those traditions. . ." (APP. Ex. 7, p. 2)

102. Historical accounts of native Hawaiian activity indicate that early Hawaiians did on occasion use geothermal steam for cooking food for non-religious purposes. (Written Testimony of Manabu Tagomori, G.S. No. 9/26/85-5)

103. The Board concludes that there are a variety of religious beliefs held by native Hawaiians. Many beliefs are

very strongly held. Some have well recognized traditions and practices. However, there is little or no evidence in the record that actual religious practices presently take place within the area proposed for the geothermal development. Neither of the parties making religious claims nor any of the witnesses testified that they had ever conducted or participated in religious ceremonies on this land. Moreover, while this property is private not public land, archaeological surveys will be conducted to insure protection of any sites that may exist.

104. The testimony presented by Pele practitioners represents their faith and personal beliefs which appear to be strongly held. The Board finds that the religious concerns of native Hawaiians deserve respect and that care should be

taken not to prohibit them from exercising their religious beliefs. However, the freedom to exercise one's religion does not mean that the activities of all others (which may not comply with the beliefs of some practitioners) are proscribed. The HGP-A well has been in production since the early 1980's. There is no indication tht tapping this heat source from the earth had diminished or negatively affected the eruptive nature of the Kilauea Volcano. In fact, Kilauea began its current eruptive phases in January, 1983 casting untold measures of heat and millions of cubic yards of magma forming many miles of lava flows after HGP-A came into production. The heat given up by volcanic eruptions is so much larger (by orders of magnitude) than any drawn by using already heated geothermal steam that comparison is meaningless. (VCA,

Ex. C, video cassette of the eruptions of Kilauea Volcano during 1983 at the April 12, 1984 hearing)

105. The former director of the Hawaiian Volcanoes Observatory testified that there is approximately 4,400 MW of thermal intrusion into the Kilauea summit and East Rift Zone each year. (VCA, Ex. 182, HA-1463)

106. Geothermal energy, being pressured steam derived from pockets of water recharged by percolation beneath the earth's core surface and heated from the earth's core, is continually renewed. Whatever may be removed will be replenished many times over. The Board finds no evidence that limited drilling of the earth's crust will irretirevably cool the thermal heat of the earth's central core or eliminate geothermal stream from beneath the Kilauea East Rift Zone.

## I. RULINGS OF PARTIES' PROPOSED FINDINGS OF FACTS

The Board makes the following rulings on the parties proposed findings of facts. Findings rejected by the Board have been rejected because they are taken out of context, or they are, in whole or in part, contrary to the facts or the law, or because they are immaterial:

5. Social Impact

| | Findings Accepted By the Board |
|---|---|
| Applicant: | E(1)(a)-(g)<br>E(1)(i)-(n)<br>E(2)(a)-(d)<br>E(3) |
| COH: | 114, 132-139,<br>143, 144, 261 |
| Sierra Club: | B(a)1-2,<br>B(a)5-6, (8), (10)<br>B(b)2, 4, 5<br>B(c)22-24, (34)<br>B(d)2, 5 |
| Dedman, Aluli: | 4, 7, 9, 11, 17, 18 |
| Kirkendall: | E(1), (3), (5)-(9)<br>G(1); H(i)-(4), (6) |
| Warshauer: | No specific findings submitted |
| Heuer: | |
| LaPlante: | |
| Dedman/Aluli: | Religious belief*/:<br>1-3, 6, 8, 10, 12-16<br>20-23, 25-29 |

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*/Many of Dedman/Aluli findings are matters of religious belief that can neither be accepted nor rejected.

| | Findings Rejected By the Board |
|---|---|
| Applicant: | E(1)(h) |
| COH: | |
| Sierra Club: | B(a)3-5; B(a)(7), (9)<br>B(a)11; B(b)1, (3)<br>B(b)6-10<br>B(c)17-21, 25, 26<br>B(c)28-33; B(d)1, 3, 4 |
| Dedman, Aluli: | 5, 12, 19, 24, 30 |
| Kirkendall: | E(2), (4), (10), (11)<br>H(5) - (7) |
| Warshauer: | No specific findings submitted |
| Heuer: | B(1), (2) |
| LaPlante: | 4 |
| Dedman/Aluli: | Religious belief*/:<br>1-3, 6, 8, 10, 12-16<br>20-23, 25-29 |

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*/Many of Dedman/Aluli findings are matters of religious belief that can neither be accepted nor rejected.

CONCLUSIONS OF LAW

Religious Claims

Among individuals of Hawaiian ancestry there are some who have sincere and deeply felt religious beliefs surrounding the deity Pele. While these beliefs appear to be strongly held, they are not the only religious beliefs held by Hawaiians. There are a variety of religious customs and beliefs, and many religious interpretations even among the follows of the Pele tradition.

The first amendment of the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion or prohibiting free exercise thereof. . .". Some individuals claim that the exercise of their religious activities will be impermissibly burdened by the proposed geothermal project.

In reviewing the testimony and the evidence in the record, the board concludes that while deeply held religious beliefs deserve great respect, there is no evidence in the record to show how individuals would be actually prohibited from freely exercising their religion. They are free to carry on their religious activities in the same manner as they may have prior to this decision.

There is in fact little or no evidence on the record showing that any party or any witness has actually used or engaged in any religious activity on this land. Simply stated, claimants have failed to show how their religious activities would be prohibited on this property.

The activities authorized by this decision do not prohibit any ceremony,

custom, practice, habit or access to religious sites. Indeed the record fails to disclose any known religious sites on the subject property. The conditions in this order require that if archaeological surveys discover such sites, the landowner must protect and preserve them.

This land, once public, now private was exchanged by the State in order that the State could acquire Kahauale'a which is the site of the present volcanic activity at Puu O'o and nearer to Kilauea Crater, which is traditionally associated with Pele. The exchange would actually afford greater protection of customary practices associated with the crest of Kilauea Crater.

While courts have recognized that religious activities are subject to reasonable regulation of time, place and manner, not even those issues are

presented here. This decision does not proscribe or restrict any behavior, training, educational activity, writing, distribution of literature, proselytization, or any other manner of expression.

Religious claimants also point to traditional and customary rights of ahupua'a tenants which are protected in Article XIII, Section 7 of Hawaii's State Constitution. The exchange deed transferring this land to Campbell Estate contained in it an express reservation of the rights of native tenants. Individuals who are tenants of the ahupua'a may continue to exercise the rights of native tenants in accordance with the law. Neither the parties raising religious claim are tenants of the ahupua'a in question.

Dr. Aluli and Mr. Dedman appear to

make two major contentions. First, they believe that Pele's presence extends throughout a geographical area from Mauna Loa to Halema'uma'u and down the east rift almost to the sea. Second, they believe certain activities in Pele's "home", such as drilling geothermal steam, offend the spirit and are in their view, sacrilegious. They contend that drilling for pressurized steam could drain and "kill" Pele.

Theological claims are matters of belief. It would violate the establishment clause for the Board to pass upon them as true or false. However, the Board is aware of the existence of numerous man made structures in the lower rift zone and near this property including existing and planned geothermal wells which have never been challenged on religious grounds.

Moreover, the record is completely lacking in any evidence to suggest that a finite number of geothermal wells will deplete the continually renewing reservoir of hot pressurized steam immediately below the earth's surface. Non specific claims that geothermal drilling will draw, diminish, and cool the heat from the earth's core so as to eliminate the rising steam along the Middle East Rift simply do not comprehend the relatively inconsequential role of human activity in comparison to large geological phenomenon. One volcanic eruption displaces vastly more heat and lava than any geothermal project could ever draw.

For these reasons, the Board concludes that the activities proposed by the applicant and authorized by this decision do not violate the claimant's

freedom to exercise their religion under the first amendment or under state law.